SCANDINAVIAN BUNKERING (SINGAPORE) PTE LTD v. MISC BHD

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASAN LAH FCJ
JEFFREY TAN FCJ
MOHAMED APANDI ALI FCJ
AZAHAR MOHAMED FCJ
[CIVIL APPEAL NO: 02(i)-16-02-2014 (W)]
16 MARCH 2015

CONFLICT OF LAWS: *Contract – Choice of law – Assessment of damages – Express choice of law clause in agreement – Agreement contained clause that disputes must be tried in foreign country – Correct heads of damages to be awarded to innocent seller for wrongful refusal by buyer to accept delivery of goods – Principle of lex fori – Whether applicable even if proper law of contract agreed to be foreign law*

CONFLICT OF LAWS: *Contract – Agreement contained clause that disputes must be tried in foreign country – Principles of conflict of laws – Whether correctly applied – Whether issue was one of 'remoteness' or 'measure of damages' – Whether plaintiff specifically elected to claim general damages – Whether quantification of general damages ought to be according to Malaysian law*

CONTRACT: *Breach – Sale of goods – Non-acceptance of delivery of goods contracted for by buyer – Assessment of recoverable damages – Liability of buyer – Whether difference between contract and market prices over period it would take any reasonable supplier to dispose of unlifted quantities of goods – Contracts Act 1950, s. 74(1) – Sale of Goods Act 1957, ss. 56 & 74(1) – Sale of Goods Act 1979 [UK], s. 50(2) & (3)*

The defendant entered into a fixed price bunker contract ('the contract') with Marinehub Sdn Bhd ('Marinehub') whereby the defendant purchased and agreed to accept delivery of fixed quantities of marine fuel oil ('MFO') over a fixed period of three months, *ie*, October, November and December 2008. There were no fixed delivery dates within the months. Instead, the contract envisaged that a number of separate relatively small deliveries would be made to ships throughout the course of each month. In order to supply the defendant under the contract, Marinehub entered into a fixed price bunker contract with the plaintiff ('the SBS FPC'), to the full knowledge of the defendant. However, when the price of MFO declined in response to the global financial crisis, the defendant, having taken delivery part of MFO for the month of October, refused to take further delivery of remaining quantity and took no delivery of the contracted quantities for November and December 2008. The defendant instead purchased MFO on the spot basis at substantially reduced prices, making a savings in excess of USD20 millions. Spot basis referred to the purchase of MFO at the prevailing market price.

Consequently, Marinehub did not take delivery of the MFO from the plaintiff and the plaintiff disposed of it on the spot market at a much lower price than had been purchased. The defendant terminated the letter of award and the contract came to an end. When it became clear that Marinehub was having difficulties with the defendant under the contract, with direct consequences on the SBS FPC, the plaintiff took assignment of Marinehub's rights and interests in and under the contract to enable the plaintiff to deal directly with the defendant. The plaintiff, acting as the assignee under the assignment agreement with Marinehub, brought the action against the defendant for breach of contract by the defendant non-acceptance of delivery of MFO and wrongful termination of contract. The Judicial Commissioner ('JC') accepted the plaintiff's primary claim framed in general damages and proceeded to assess the quantum of general damages awarded to the plaintiff by taking the difference between the contract price and the market price of the MFO. The application of the market price differential was done by referring to the English Sale of Goods Act 1979, in particular, s. 50(3) and the plaintiff was awarded a total sum of USD25,246,233.17. However on appeal against the quantum of damages awarded, the Court of Appeal reduced the quantum to a total sum of USD177,410.90 being the amount that Marinehub would have made had the contract been performed. The core issue before the Court of Appeal was that the quantum of damages awarded by the JC as general damages was in error. Essentially, the Court of Appeal held that the issue of quantification of damages should be in accordance with the *lex fori*, *ie*, Malaysian law and that under the Malaysian law, the measure of damages is determined by reference to s. 74(1) of the Contracts Act 1950 ('CA 1950') and s. 56 of the Malaysian Sale of Goods Act 1957 ('SOGA 1957'). Aggrieved by the decision of the Court of Appeal, the plaintiff sought leave to appeal to the Federal Court which was allowed on the following questions of law: (i) whether the conflict of law principle in *J D'Almeida Araujo LDA v. Sir Frederick Becker & Co Ltd* and *Boys v. Chaplin* as applied in *Chan Kwon Fong v. Chan Wah* and in *Eikobina (M) Sdn Bhd v. Mensa Mercantile (Far East) Pte Ltd* represents good law in Malaysia, was correctly applied by the JC; and if so whether the Court of Appeal was entitled to reverse it and/or not apply it; (ii) in a case where there was an available market for the goods, whether the law on the assessment of damages for non-acceptance of goods pursuant to ss. 56 and 61 of the SOGA 1957 and s. 74 of the CA 1950 is the same or arrives at same conclusion, as the corresponding provisions under ss. 50 and 54 of the English Sale of Goods Act 1979 as was found by the JC, and if so, whether the Court of Appeal was entitled to reverse it and/or not apply it; (iii) whether the principle of law that, loss of profit and liability of the innocent party to a third party under a third party contract were inseparable two-fold limbs recoverable together as special damages, represents good law in Malaysia, and if so, whether the decision of the Court of Appeal ought to be set aside/wholly reversed; and (iv) whether the principle of law in *Total Liban SA v. Vitol*

A *Energy SA* is good law in Malaysia, in determining that the liability to a third party need not first have to be paid by the innocent party for it to be recoverable from the party in breach.

Held (allowing appeal in part; setting aside quantum of damages awarded by Court of Appeal; restoring quantum of damages awarded by High Court) Per Azahar Mohamed FCJ delivering the judgment of the court:

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(1) The leave questions were related to the law applicable to the assessment of damages in the context of an express choice of law clause and the correct heads of damages to be awarded to an innocent seller for the wrongful refusal by a buyer to accept delivery of goods. (para 27)

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(2) The basic general principle is that, in accordance with the principles of conflicts of laws, in an action for damages for breach of contract governed by foreign law, the measure of damages or quantification of damage should be according to the *lex fori*, *ie,* Malaysian law, even if the proper law of contract is agreed to be foreign law. Applying this principle, determining that the plaintiff was entitled to general damages and not special damages would be considered to be questions of substance and hence, governed by the *lex causae*, *ie*, the English law being the law of contract. On the other hand, determining the actual 'amount' of general damages is a matter of 'quantification' or the 'measure' of the general damages that the plaintiff is entitled to would be considered procedural matters governed by the *lex fori, ie*, Malaysian law. (para 37)

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(3) The Court of Appeal rightly took the approach that in accordance with the principles of conflict of laws, the measure of damages or quantification should be according to the *lex fori*, *ie,* Malaysian law, even if the proper law of contract was agreed to be foreign law. The issue in this case was not one of 'remoteness' but the 'measure of damages'. The plaintiff had specifically elected to claim either general damages or, in the alternative, special damages. General damages are given in respect of such damage as the law presumes to result from the infringement of a legal right and duty: damages must be proved but the claimant cannot quantify exactly any particular items in it. Therefore, the quantification of general damages ought to be according to the Malaysian law. Hence, the Court of Appeal did not reverse the conflict of laws principle enunciated in the cases referred in question (i). (para 38)

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(4) Section 50(1) of the English Sale of Goods Act 1979 is identical to s. 56 of the 1950 Act which confers the right on a seller to sue a buyer for damages, where there is non-acceptance of the goods contracted for. However, the SOGA 1957 does not provide how damages thereunder are to be assessed or quantified as it does not provide the equivalent of sub-s. 50(2) and (3) of the English Sale of Good Act 1979. However, s. 74(1) of the 1950 Act provides that the party may recover any loss

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or damage which naturally arises in the usual course of things; or which the parties knew when they made the contract to be likely to result from the breach of the contract. (paras 46 & 48)

(5) Based on authority as well as on principle, there is no difference between English law and Malaysian law on the assessment of recoverable damages. When there is an available market, pursuant to s. 74(1) of the 1950 Act, the loss directly and naturally resulting in the ordinary course of events is the market price differential. Thus the defendant's liability was for the difference between the contract price and the market price at the time and place fixed by the contract for the acceptance of the MFO. (para 54)

(6) As assignee of the contract, the plaintiff's damages against the defendant for non-acceptance of the MFO was general damages, namely the difference between the contract price and the market price over the period it would take any reasonable supplier to dispose of the unlifted quantities of MFO. The measure of damages was the loss directly and naturally resulting, in the ordinary course of event, from the defendant's non-acceptance of the delivery of the MFO and for wrongful termination of the contract. (para 62)

(7) The defendant had the full knowledge from the beginning that Marinehub had entered into a back-to-back SBS FPC with the plaintiff to ensure the supply of MFO to the defendant's ships under the contract. It did not matter that Marinehub did not purchase the MFO from the plaintiff, nor that it did not in fact sell the MFO to alternative buyers after the contract was broken. The law assesses Marinehub's damages as if it had gone into the market and re-sold the goods. Damages are calculated on the assumption that Marinehub acted reasonably to mitigate its loss by going into market to re-sell the MFO. (para 62)

(8) In the circumstances, there was no error in the judgment of the JC. Question (ii) was therefore answered in the affirmative. The Court of Appeal was not entitled to reverse the settled principle that general damages in the form of market price differential is recoverable by an innocent seller upon breach of contract by the buyer. In light of the findings and in the circumstances of the case, it was unnecessary for the court to answer questions (iii) and (iv). (paras 63 & 64)

Bahasa Malaysia *Translation Of Headnotes*

Defendan memasuki satu kontrak *bunker* harga tetap ('kontrak') dengan Marinehub Sdn Bhd ('Marinehub') di mana defendan membeli dan bersetuju untuk menerima penghantaran kuantiti tetap bahan api marin ('MFO') bagi tempoh tetap selama tiga bulan iaitu Oktober, November dan Disember 2008. Tidak ada tarikh penghantaran tetap dalam tempoh tersebut. Sebaliknya, kontrak tersebut menjangka beberapa penghantaran kecil yang berasingan dibuat ke kapal sepanjang tempoh bulan-bulan tersebut. Untuk

membekalkan kepada defendan di bawah kontrak, Marinehub memasuki satu kontrak harga *bunker* tetap dengan plaintif ('SBS FPC'), dengan pengetahuan penuh defendan. Walau bagaimanapun, apabila harga MFO turun berikutan krisis kewangan dunia, defendan, yang telah menerima penghantaran sebahagian MFO bagi bulan Oktober, enggan menerima penghantaran selanjutnya bagi kuantiti yang tinggal dan tidak menerima penghantaran kuantiti yang dikontrak bagi bulan November dan Disember 2008. Defendan sebaliknya membeli MFO atas dasar segera pada harga yang amat kurang, dengan menjimatkan jumlah melebihi USD20 juta. Dasar segera merujuk kepada pembelian MFO pada harga pasaran semasa. Dengan itu, Marinehub tidak mengambil penghantaran MFO daripada plaintif dan plaintif melupuskannya di pasaran segera pada harga yang lebih rendah daripada yang dibelinya. Defendan kemudian menamatkan surat tawaran dan kontrak menjadi tamat. Apabila jelas bahawa Marinehub mengalami kesukaran dengan defendan di bawah kontrak tersebut, dengan akibat langsung atas SBS FPC, plaintif mengambil penyerahan hak bagi hak-hak dan kepentingan-kepentingan Marinehub dalam dan di bawah kontrak tersebut untuk membolehkan plaintif berurusan secara langsung dengan defendan. Plaintif, bertindak sebagai pemegang serah hak di bawah perjanjian penyerahan hak dengan Marinehub, memulakan tindakan terhadap defendan bagi kemungkiran kontrak oleh defendan dengan tidak menerima penghantaran MFO dan penamatan kontrak secara salah. Pesuruhjaya Kehakiman ('PK') menerima tuntutan utama plaintif yang berasaskan ganti rugi am dan meneruskan untuk mentaksir kuantum ganti rugi am yang diawardkan kepada plaintif dengan mengira perbezaan antara harga kontrak dan harga pasaran MFO. Penggunaan perbezaan harga pasaran dibuat merujuk kepada Akta Jualan Barangan 1979 Inggeris, khususnya s. 50(3) dan plaintif diawardkan sejumlah USD25,246,233.17. Walau bagaimanapun, atas rayuan terhadap kuantum ganti rugi yang, Mahkamah Rayuan mengurangkan kuantum tersebut kepada sejumlah USD177,410.90 sebagai jumlah keuntungan Marinehub jika kontrak telah dilaksanakan. Isu utama di Mahkamah Rayuan adalah bahawa kuantum ganti rugi yang diawardkan oleh PK sebagai ganti rugi am adalah khilaf. Pada asasnya, Mahkamah Rayuan memutuskan bahawa isu pengkuantitian ganti rugi perlu mengikut *lex fori* iaitu undang-undang Malaysia dan bahawa di bawah undang-undang Malaysia, kiraan ganti rugi ditentukan dengan rujukan kepada s. 74(1) Akta Kontrak 1950 ('Akta 1950') dan s. 56 Akta Jualan Barangan 1957 ('SOGA 1957') Malaysia. Terkilan dengan keputusan Mahkamah Rayuan, plaintif memohon kebenaran untuk merayu kepada Mahkamah Persekutuan yang telah dibenarkan atas persoalan-persoalan undang-undang berikut: (i) sama ada prinsip konflik undang-undang dalam kes *J D'Almeida Araujo LDA v. Sir Frederick Becker & Co Ltd* dan *Boys v. Chaplin* seperti yang diaplikasi dalam kes *Chan Kwon Fong v. Chan Wah dan Eikobina (M) Sdn Bhd v. Mensa Mercantile (Far East) Pte Ltd* mewakili undang-undang sah di Malaysia, diguna pakai dengan betul oleh PK; dan jika benar sama ada Mahkamah Rayuan berhak untuk mengakasnya dan/atau tidak menggunakannya; (ii) dalam keadaan di

mana terdapat pasaran bagi barangan tersebut, sama ada undang-undang bagi taksiran ganti rugi bagi ketidakpenerimaan barangan menurut ss. 56 dan 61 SOGA 1957 dan s. 74 Akta 1950 adalah sama atau mencapai kesimpulan yang sama seperti peruntukan sama di bawah ss. 50 dan 54 Akta Jualan Barangan 1979 Inggeris seperti yang diputuskan oleh PK, dan jika benar, sama ada Mahkamah Rayuan berhak untuk mengakasnya dan/atau tidak menggunakannya; (iii) sama ada prinsip undang-undang bahawa, kehilangan keuntungan dan liabiliti pihak yang tidak bersalah kepada pihak ketiga di bawah kontrak pihak ketiga adalah bahagian berganda yang tidak boleh dipisahkan yang boleh diperolehi bersama sebagai ganti rugi khas, mewakili undang-undang sah di Malaysia, dan jika begitu, sama ada keputusan Mahkamah Rayuan wajar diketepikan/diakas secara keseluruhan; dan (iv) sama ada prinsip undang-undang dalam kes *Total Liban SA v. Vitol Energy SA* adalah undang-undang sah di Malaysia, dalam menentukan bahawa liabiliti kepada pihak ketiga tidak perlu mula-mula dibayar oleh pihak yang tidak bersalah untuk ia diperolehi semula daripada pihak yang dalam kemungkiran.

Diputuskan (membenarkan sebahagian rayuan; mengenepikan kuantum ganti rugi yang diawardkan oleh Mahkamah Rayuan; mengembalikan kuantum ganti rugi Mahkamah Tinggi)
Oleh Azahar Mohamed HMP menyampaikan penghakiman mahkamah:

(1) Soalan-soalan untuk kebenaran adalah berkaitan dengan undang-undang yang terpakai bagi taksiran ganti rugi dalam konteks klausa pilihan undang-undang yang jelas dan tajuk ganti rugi yang betul untuk diawardkan kepada penjual tidak bersalah bagi keengganan pembeli secara salah untuk menerima penghantaran barangan.

(2) Prinsip asas yang umum adalah bahawa, menurut prinsip-prinsip konflik undang-undang, dalam sesuatu tindakan bagi ganti rugi bagi kemungkiran kontrak yang tertakluk kepada undang-undang asing, pengiraan ganti rugi atau pengkuantitian ganti rugi perlu menurut *lex fori*, iaitu undang-undang Malaysia, walaupun undang-undang kontrak yang sewajarnya telah dipersetujui sebagai undang-undang asing. Mengguna pakai prinsip ini, mempertimbangkan bahawa plaintif berhak kepada ganti rugi am dan bukan ganti rugi khas akan dikira sebagai persoalan intipati dan dengan itu, tertakluk kepada *lex causae* iaitu undang-undang Inggeris sebagai undang-undang kontrak. Sebaliknya, mempertimbangkan bahawa 'jumlah' sebenar ganti rugi am adalah perkara 'pengkuantitian' atau 'pengiraan' ganti rugi am yang plaintif berhak menerima adalah dianggap perkara prosedur yang tertakluk kepada *lex fori*, iaitu undang-undang Malaysia.

(3) Mahkamah Rayuan telah dengan betul mengambil pendekatan bahawa berikutan dengan prinsip-prinsip konflik undang-undang, pengiraan ganti rugi atau pengkuantitian perlu menurut *lex fori*, iaitu undang-undang Malaysia, walaupun undang-undang kontrak yang sepatutnya

telah dipersetujui adalah undang-undang asing. Isu dalam kes ini bukan berkaitan 'remoteness' tetapi 'measure of damages'. Plaintif telah dengan spesifik memilih untuk menuntut sama ada ganti rugi am atau, secara alternatifnya, ganti rugi khas. Ganti rugi am diberikan berkaitan dengan ganti rugi yang dianggap dari segi undang-undang diakibatkan oleh pelanggaran hak dan kewajipan undang-undang; ganti rugi mesti dibuktikan tetapi penuntut tidak boleh menentukan dengan tepat apa-apa butiran di dalamnya. Oleh itu pengkuantitian ganti rugi am perlu menurut undang-undang Malaysia. Oleh itu Mahkamah Rayuan tidak mengakas prinsip konflik undang-undang yang diutarakan dalam kes-kes yang dirujuk dalam soalan (i).

(4) Seksyen 50(1) Akta Jualan Barangan 1979 Inggeris adalah serupa dengan s. 56 Akta 1950 yang memberikan hak kepada penjual menyaman pembeli bagi ganti rugi, di mana terdapat ketidakpenerimaan barangan yang dikontrak. Walau bagaimanapun, SOGA 1957 tidak memperuntukkan bagaimana ganti rugi di bawahnya akan ditaksir atau dikira kerana ia tiada peruntukan yang serupa dengan sub-s. 50(2) dan (3) Akta Jualan Barangan 1979 Inggeris. Walau bagaimanapun, s. 74(1) Akta 1950 memperuntukkan bahawa pihak tersebut boleh memperolehi semula apa-apa kerugian atau ganti rugi yang berlaku secara semulajadi dalam perjalanan sesuatu perkara; atau yang mana pihak-pihak mempunyai pengetahuan akan berlaku akibat daripada kemungkiran kontrak semasa mereka memasuki kontrak.

(5) Berdasarkan kepada autoriti-autoriti dan juga prinsip, tidak ada perbezaan antara undang-undang Inggeris dan undang-undang Malaysia berkaitan taksiran ganti rugi yang boleh diperolehi. Apabila wujud pasaran, menurut s. 74(1) Akta 1950, kerugian langsung dan yang berlaku secara semulajadi dalam penjalanan perkara adalah perbezaan harga pasaran. Oleh itu liabiliti defendan adalah terhadap perbezaan di antara harga kontrak dan harga pasaran pada masa dan tempat yang ditetapkan oleh kontrak bagi penerimaan MFO.

(6) Sebagai pemegang serah hak kontrak tersebut, ganti rugi plaintif terhadap defendan bagi ketidakpenerimaan MFO adalah ganti rugi am, iaitu perbezaan antara harga kontrak dan harga pasaran bagi tempoh yang diambil oleh mana-mana pembekal munasabah untuk melupuskan kuantiti MFO yang tidak diterima. Pengiraan ganti rugi adalah kerugian langsung dan akibat semulajadi, dalam perjalanan sesuatu perkara, daripada ketidakpenerimaan penyerahan MFO oleh defendan dan bagi penamatan kontrak secara salah.

(7) Defendan mempunyai pengetahuan penuh dari awal bahawa Marinehub telah memasuki kontrak saling sandar-menyandar SBS FPC dengan plaintif untuk memastikan Bekalan MFO ke kapal defendan di bawah kontrak tersebut. Tidak menjadi hal bahawa Marinehub tidak membeli MFO daripada plaintif, atau bahawa ia tidak sebenarnya menjual MFO

kepada pembeli-pembeli alternatif selepas kontrak dimungkiri. Undang-undang mentaksir ganti rugi Marinehub dengan andaian ia telah menjual semula barangan tersebut di pasaran. Ganti rugi dikira dengan anggapan bahawa Marinehub telah bertindak secara munasabah untuk mengurangkan kerugiannya dengan menjual semula MFO di pasaran.

(8) Dalam keadaan tersebut, tidak ada kekhilafan dalam penghakiman PK. Soalan (ii), oleh itu, dijawab secara afirmatif. Mahkamah Rayuan tidak berhak untuk mengakas prinsip matan bahawa ganti rugi am dalam bentuk perbezaan harga pasaran boleh diperoleh semula oleh penjual tidak bersalah atas kemungkiran kontrak oleh pembeli. Berdasarkan dapatan-dapatan dan hal keadaan kes, adalah tidak perlu bagi mahkamah menjawab soalan-soalan (iii) dan (iv).

Case(s) referred to:

Aercap Partners v. Avia Asset Management AB [2010] EWHC 2431 ***(refd)***
Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn & Ors [1993] 2 CLJ 495 SC ***(refd)***
Boys v. Chaplin [1971] AC 356 ***(refd)***
Chan Kwon Fong & Anor v. Chan Wah [1977] 1 LNS 12 FC ***(refd)***
Eikobina (M) Sdn Bhd v. Mensa Mercantile (Far East) Pte Ltd [1994] 2 CLJ 6 SC ***(refd)***
Hadley v. Baxendale [1859] 9 Ex 341 ***(refd)***
Hall v. Pim [1928] 30 Lloyd's 159 ***(refd)***
J D'Almeida Araujo LDA v. Sir Frederick Becker & Co Ltd [1953] 2 QB 329 ***(refd)***
Lee Heng & Co v. C Melchers & Co [1962] 1 LNS 79 HC ***(refd)***
Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***
Metelmann v. NBR [1984] 1 Lloyd's Rep 614 ***(refd)***
Tan Chin Kim Sawmill and Factory Sdn Bhd & Anor v. Lindeteves-Jacoberg (M) Sdn Bhd [1980] 1 LNS 73 HC ***(refd)***
Toeh Kee Keong v. Tambun Mining Co Ltd [1967] 1 LNS 197 FC ***(refd)***
Total Liban SA v. Vitol Energy SA [2001] QB 643 ***(refd)***
Westbrook Resources Ltd v. Gobe Metallurgical Inc [2007] EWHC 2353 (Comm) ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74(1)
Courts of Judicature Act 1964, s. 96(a)
Rules of the High Court 1980, O. 14
Sale of Goods Act 1957, ss. 56, 61

Sale of Goods Act 1979 [UK], ss. 50(1), (2), (3), 54

Other source(s) referred to:

Cheshire, North & Fawcett, Private International Law, 14th edn, p 98
Chitty on Contracts, General Principles, 30th edn, vol paras 26-006
Chitty on Contracts, Specific Contracts, 30th edn, vol 2, Chapter 43
Dicey, Morris and Collins on The Conflict of Laws, vol 2, 14th edn, 2006, p 192
Halsbury's Laws of Malaysia 2002, vol 14 p 20
Halsbury's Laws of Malaysia 2004, vol 24 p 414

For the appellant - Tommy Thomas (Sitpah Selvaratnam & Rahayu Mumazaini with him); M/s Tommy Thomas
For the respondent - Darryl SC Goon (Raja Eileen Soraya & Nicol Ong with him); M/s Raja, Darryl & Loh

[Appeal from Court of Appeal; Civil Appeal No: W-02(IM)-1499-2011]

Reported by S Barathi

JUDGMENT

Azahar Mohamed FCJ:

Introduction

[1] This is an appeal by Scandinavian Bunkering (Singapore) Pte Ltd (the plaintiff in the High Court) against the quantum of damages awarded by the Court of Appeal. The damages awarded were in respect of a claim by the plaintiff against the respondent, MISC Berhad (the defendant in the High Court) for breach of contract of a sale of fixed quantities Marine Fuel Oil ("MFO") also referred to as fixed price bunker supply agreement.

[2] We will describe the parties in this judgment as they appear in the High Court, namely the appellant as the plaintiff and the respondent as the defendant.

[3] It has to be highlighted at this point that the liability of the defendant to the plaintiff for breach of contract had been previously established following the summary judgment of the High Court dated 23 September 2009 pursuant to O. 14 of the Rules of the High Court 1980 and the dismissal of the defendant's appeal from that judgment by the Court of Appeal on 6 July 2010. On the liability issue, it was determined that the defendant had no triable issues that should go for trial. The defendant had been held liable to pay damages to the plaintiff for breach of contract for its failure to take delivery of the MFO and for wrongful repudiation of the contract of a sale of fixed quantities MFO agreements, with damages to be assessed. The defendant was denied leave to appeal against the decision of the Court of Appeal by the Federal Court on 6 October 2010.

[4] By a separate hearing for assessment of damages for breach of contract, the High Court on 16 May 2011 awarded the plaintiff a total sum of USD25,246,233.17. On appeal against the said quantum of damages awarded, the Court of Appeal on 18 December 2012 reduced the quantum awarded by the High Court to a total sum of USD177,410.90.

[5] Aggrieved by the judgment of the Court of Appeal, the plaintiff applied for leave to appeal to the Federal Court under s. 96(a) of the Courts of Judicature Act 1964 and on 16 January 2014, this court granted leave to appeal to the plaintiff on four questions of law. Hence, the present appeal.

Background Facts

[6] The plaintiff is a private limited company incorporated under the laws of Singapore, carrying on the business of trade and transportation of petroleum and other liquid products. The defendant is a public listed company incorporated under the laws of Malaysia.

[7] On 16 September 2008, the defendant entered into a fixed price bunker contract ("the contract") with Marinehub Sdn Bhd ("Marinehub") whereby the defendant purchased and agreed to accept delivery of 102,600mt, +/- 5%, of MFO 380 cst over a fixed period of three months beginning 1 October 2008 until 31 December 2008, on the basis of 34,200 metric tons per month, at a fixed price of USD559.80 per mt, evidenced, among others, by the Letter of Award dated 16 September 2008 issued by the defendant to Marinehub. Delivery of the MFO was to be at Singapore to satisfy the defendant's fleet requirements. The total contract value was USD57,435,480. The contract was governed by English law.

[8] The defendant essentially wanted Marinehub to lock in the price of MFO over three months. In the early part of 2008, the price of MFO was rising rapidly. As ship owners, the defendant wanted certainty in their bottom line costs of MFO, and so entered into the contract to lock the defendant's costs of purchase of its required amount of MFO to a fixed price.

[9] At the same time, and back-to-back with the contract, Marinehub to the full knowledge of the defendant, entered into a fixed price bunker contract with the plaintiff ("the SBS FPC") whereby Marinehub purchased the same quantity of 102,600mt, +/-5% of MFO, at a fixed price of USD557.50 per mt, for the same fixed period from 1 October 2008 to 31 December 2008, for delivery to the defendant's ships. This is an important point that should be kept in mind.

[10] As it turned out, 2008 was a year of extreme volatility in the trading of MFO. The prices were surging upwards to unprecedented levels on or before October 2008. Then, October, November and December 2008 saw a rapid decline in prices for MFO in response to the global financial crisis. The contract, as events unfolded, was part performed by the defendant, with the defendant taking delivery 18 parcels amounting to only 20,334.59mt of MFO during October 2008.

[11] The dispute in the present case arose as soon as the defendant refused to take further delivery of the remaining quantity for October 2008 and took no delivery of the contracted quantities of MFO for November and December 2008. The defendant instead purchased MFO on the spot basis at substantially reduced prices, making a savings in excess of USD20 million. Spot basis refers to the purchase of MFO at the prevailing market price.

[12] By email dated 14 November 2008 and sent to Marinehub, the defendant stated that "… we will terminate our Letter of Award dated 16 September 2008 pursuant to cl. 2.2 of the same". This was accepted either before or the latest on 1 December 2008 as bringing the contract to an end.

[13] In the meantime, Marinehub did not take delivery of the MFO from the plaintiff, and the plaintiff disposed of it on the spot market at much lower prices than had been purchased.

[14] When it became clear that Marinehub was having difficulties with the defendant under the contract, with direct consequences on the SBS FPC, the plaintiff took an assignment of Marinehub's rights and interests in and under the contract to enable the plaintiff to deal directly with the defendant. The plaintiff and Marinehub entered into an assignment agreement on 12 November 2008 ("the assignment agreement"). Clause 2.1 of the assignment agreement provides in relevant part is as follows:

> The Assignor, with full title guarantee, assigns absolutely to the Assignee, all of the Assignor's rights, interests (present and future), benefit and title to, in connection with or in respect of the Marinehub Bunker Agreement (including, without limitation, the Assigned Sums that are due and owing from MISC to the Assignor as at the date of this Assignment).

[15] Notice in writing of the assignment agreement was given to the defendant on 13 November 2008.

[16] Acting as assignee under the assignment agreement, the plaintiff brought this action against the defendant by filing a writ of summons and statement of claim on 3 February 2009. The plaintiff's claim was for breach of contract by the defendant for non-acceptance of delivery of 82,265mt of MFO and wrongful termination of the contract dated 16 September 2008.

[17] In its amended statement of claim, the plaintiff as assignee of Marinehub's rights under the contract, in the main, framed its claim in the alternative, as either:

(a) General damages, being the market price differential between the contract price of USD559.80 per metric ton and the market price for MFO at the material time in 2008, which had drastically fallen (as pleaded in para. 11 of the amended statement of claim). It was pleaded that it would have taken from 1 to 7 November to dispose of the MFO that the defendant should have accepted in October and from 14 November to 14 December to dispose of the MFO that the defendant should have accepted in November and December, and that it had applied the average market price during these periods to the relevant quantities; or

(b) Special damages, being Marinehub's loss of profits in the difference in price under the contract and the SBS FPC, plus Marinehub's liability to the plaintiff for the plaintiff's loss upon the actual re-sale in the fallen

market by the plaintiff of the MFO not accepted by the defendant, and thereby, not accepted by Marinehub (as set out in para. 14 of the plaintiffs amended statement of claim).

Proceedings At The High Court

[18] After a trial over three days, with six witnesses (including two expert witnesses called by the plaintiff) and having heard submissions from both parties, the learned Judicial Commissioner ("JC") found at the conclusion of the proceedings for assessment of damages, that the plaintiff had established its claim for damages.

[19] The learned JC held that under the applicable principle of conflict of laws, the applicable law as to remoteness of damages was English law ie, the governing law of the contract.

[20] The learned JC held that the plaintiff was entitled to general damages. Following this finding, the learned JC then proceeded to assess the quantum of general damages awarded to the plaintiff by taking the difference between the contract price and the market price of the MFO ie, the market price differential was applied. The application of the market price differential was done by reference to the English Sale of Goods Act 1979 and in particular, s. 50(3) thereof.

[21] Further, the learned JC found that Malaysian law on the relevant damages recoverable for non-acceptance of goods would arrive at the same conclusion as English law by virtue of s. 56 of the Malaysian Sale of Goods Act, 1957 and s. 74 of the Contracts Act, 1950. Relying on, among others, the judgments in *Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569 and *Lee Heng & Co v. C Melchers & Co* [1962] 1 LNS 79; [1963] 1 MLJ 47, the learned JC held that damages under Malaysian law would also be awarded on a market price differential basis.

[22] The learned JC therefore accepted the plaintiff's primary claim framed in general damages as per para. 11 of the amended statement of claim, and ordered the defendant to pay damages in the sum of USD25,246,233.17, the currency of the contract being US Dollars. In assessing damages, the learned JC made findings of fact as to the quantities not taken up by the respondent ie, 77,135.174mt, the relevant periods and the average market as follows:

Period	Average Market Price (USD/mt)	Difference (USD/mt)	Quantity (mt)	Amount (USD)
(a) October 2008	257.10	302.70	12,155.174	3,679,371.17
(b) November & December 2008	227.90	331.90	64,980.00	21,566,862.00
Total award				**25,246,233.17**

A **Proceedings At The Court Of Appeal**

[23] The core issue before the Court of Appeal was that the quantum of damages awarded by the High Court as general damages was in error. This issue was addressed by reference to the law applicable for assessment of damages and the actual quantum of damages assessed.

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[24] Essentially the Court of Appeal held that the issue of quantification of damages should be in accordance with the *lex fori* ie, Malaysian law and that under Malaysian law, the measure of damages is determined by reference to s. 74(1) of the Contracts Act 1950 as s. 56 of the Malaysian Sale of Goods Act 1957 does not provide any measure of damages. The Court of Appeal took the view that what naturally arose from the defendant's breach was Marinehub's loss of what it would have made ie, loss of profits, had the contract been performed; and that Marinehub's loss would be a sum of USD177,410.90 being the amount that Marinehub would have made, had the contract been performed.

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[25] In the result, the Court of Appeal allowed the defendant's appeal and the damages awarded to the plaintiff was reduced from USD25,246,233.17 to USD177,410.90 based on the quantity of the MFO that the learned JC found which was not taken up/bought by the defendant.

E **The Questions Of Law On Appeal To The Federal Court**

[26] As mentioned earlier, this court granted leave to the plaintiff to appeal against the decision of the Court of Appeal on the following four questions of law:

F (i) Whether the conflict of law principle pronounced in *J D'Almeida Araujo LDA v. Sir Frederick Becker & Co Ltd* [1953] 2 QB 329 and *Boys v. Chaplin* [1971] AC 356 as applied by Raja Azlan Shah FCJ in *Chan Kwon Fong & Anor v. Chan Wah* [1977] 1 LNS 12; [1977] 1 MLJ 232 and Peh Swee Chin SCJ in *Eikobina (M) Sdn Bhd v. Mensa Mercantile (Far East) Pte Ltd* [1994] 2 CLJ 6; [1994] 1 MLJ 553 represents good law in Malaysia, was

G correctly applied by the High Court; and if so, whether the Court of Appeal was entitled to reverse it, and/or not apply it;

(ii) In a case where there is an available market for the goods, whether the law on the assessment of damages for non-acceptance of goods pursuant

H to s. 56 and 61 of the Sale of Goods Act 1957 and s. 74 of the Contracts Act 1950 is the same or arrives at the same conclusion, as the corresponding provisions under ss. 50 and 54 of the English Sale of Goods Act 1979 as was found by the High Court; and if so, whether the Court of Appeal was entitled to reverse it and/or not apply it;

I (iii) Whether the principle of law in *inter alia Hall v. Pim* [1928] 30 Lloyd's Rep 159 that:

(a) Loss of profit; and

(b) Liability of the innocent party to a third party under a third party contract.

are inseparable two fold limbs recoverable together as special damages, represents good law in Malaysia, and if so, whether, the decision of the Court of Appeal ought to be set aside/wholly reversed; and

(iv) Whether the principle of law expounded in *inter alia Total Liban SA v. Vitol Energy SA* [2001] QB 643 is good law in Malaysia, in determining that the liability to a third party need not first have to be paid by the innocent party for it to be recoverable from the party in breach.

[27] From the above, it can be seen that the leave questions relate to the law applicable to the assessment of damages in the context of an express choice of law clause and the correct head(s) of damages to be awarded to an innocent seller for the wrongful refusal by a buyer to accept delivery of goods.

[28] We will deal first with Question 1.

Question 1

[29] Question 1 raises for the most part the basic issue of whether English law or Malaysian law should apply for the assessment of damages in this case. It is not disputed that the proper law of the contract is English Law. On that, there is no doubt because cl. 13 of the contract states as follows:

13. Governing Law

13.1 This Agreement and the interpretation thereof is governed by English Law and both parties agree to submit to sole and exclusive Jurisdiction of the courts of Malaysia.

[30] On this issue, the submissions of learned counsel for the plaintiff can be summarised as follows. The contract contained an express choice of law clause, cl. 13, which provided for English law. This express choice of law clause governed the head(s) of damages, or type of loss based on remoteness, recoverable by the plaintiff from the defendant for breach of the contract. In this instance, the head(s) of damages under contemplation were either: market price differential, as general damages; or loss of profits plus an indemnity for Marinehub's liability to the plaintiff, both assessed with reference to a third party contract (being the SBS FPC), as special damages. As to which of these head(s) of damages is recoverable is to be determined by English law as the substantive law of the contract. The actual quantification or amount of monies recoverable under the appropriate head(s) of damages, based on rules of evidence and procedure, is then determined by Malaysian law as the law of the forum, *lex fori*.

[31] On the other hand, learned counsel for the defendant contended that the High Court should have applied Malaysian law, instead of the proper law of the contract (English law), when assessing or quantifying the measure of damages to be awarded to the defendant. It was his submissions that the

A applicable principle of private international law (conflicts of law) was that while the parties might elect a foreign law as the proper law of the contract (the *lex causae*), it was the law of the forum (the *lex fori*) that was to be applied for the purposes of determining the measure of damages and quantification of the damages to be awarded. According to learned counsel, the *lex fori* in B this case was Malaysian law as the proceedings were brought in the High Court of Malaya.

[32] On the conflict of law issue, the distinction that is drawn between the applicable law of contract and the applicable law for the purposes of the forum's assessment of damages can be found in the following authorities. A C synopsis of the applicable law is set out in *Dicey, Morris and Collins on The Conflict of Laws*, vol. 2, 14th edn., 2006, at p. 192 as follows:

> (6) Damages … In other cases, although there are *dicta* to the effect that damages depend on the *lex fori,* it now seems clear that the law relating to damages is partly procedural and partly substantive. A distinction must D be drawn between remoteness and heads of damage, which are questions of substance governed by the *lex causae*, and measure or quantification of damages, which is a question of procedure governed by the *lex fori*. The former include the question in respect of what items of loss the claimant can recover compensation. The latter includes the method to be used in assessing the monetary compensation which the defendant must pay in E respect of those items of loss for which he is liable.
>
> The distinction between remoteness of damage and measure of damages was drawn by Pitcher J in *D'Almeida Araujo LDA v. Sir Frederick Becker and Co Ltd*, a case of contract decided before the enactment of the Contract (Applicable Law) Act 1990, where he applied the law governing the F contract and not the *lex fori* to the former question.
>
> The rule that questions of heads of damages are substantive applies to actions in tort as well as to actions in contract. Thus in *Boys v. Chaplin* a majority of the House of Lords held that the question whether damages were recoverable for pain and suffering was a question of substance.

G **[33]** The applicable law as stated in *Cheshire, North & Fawcett, Private International Law*, 14th edn. p. 98 is set out as follows:

> (iii) Measure of damages
>
> The next question is by what law is the measure of damages governed? A rule as to the measure of damages in the narrow sense is a mere rule H of calculation. Its function is to quantify in terms of money the sum payable by the defendant in respect of the injury, whether it be a tort or breach of contract, for which his liability has already been determined by the governing law. A claimant who seeks to recover compensation in England in respect of an obligation that is governed as to substance by I a foreign law has already acquired a right the nature and extent of which have been fully determined. His object is that his right as established shall be converted by the English court into a right to receive a definite sum of money he is entitled to be paid in full for the injury suffered and he takes advantage of the English process and machinery in order to exact this payment.

> It would seem, therefore, that all questions that arise in the course of this quantification of the amount payable should be governed by English law as the law of the forum. This has been the approach, traditionally of courts in the United Kingdom. Although Pilcher J has said that, 'the quantification of damage, which according to the proper law is not too remote, should be governed by the *lex fori*' (The *D'Almeida Case* [1953] 2 QB 329 at 336), some opposition has been expressed. Indeed McNair J found, 'the greatest possible difficulty in appreciating the distinction between the remoteness of damage and measure of damage'. Moreover, if the quantification of damages is considered to be a matter of procedure, to be governed by the *lex fori* "difficulties will arise if the applicable law recognises a cause of action which is unknown to the English domestic law (the *lex fori*), for the simple reason that here will be no English domestic rules on quantification and assessment of the English court to apply as the *lex fori*. Nevertheless, the distinction has long been held both valid and valuable by the House of Lords.

[34] In *J D'Almeida Araujo LDA v. Sir Frederick Becker & Co Ltd (supra)*, the plaintiffs entered into a contract, the proper law of which was Portuguese, to sell 500 tons of palm-oil to the defendants. As a result of a breach by the defendants, the plaintiffs committed a breach of a contract with a third party for which they were liable to pay the third party an indemnity. In an action by the plaintiffs for damages for breach of contract, it was held that the question whether the plaintiffs were entitled to recover the indemnity from the defendant was a question of remoteness of damage to be decided according to Portuguese law. Pilcher J after considering the authorities and literature observed as follows:

> That passage from Professor Cheshire's book seems to me to be very closely reasoned and to offer considerable help in deciding this problem, which is not an easy one. The conclusion at which he arrives would seem to be that questions of remoteness of damages should be governed by the proper law of contract, whereas the quantification of damage, which according to the proper law is not too remote, is governed by the *lex fori*.

[35] In *Boys v. Chaplin* [1971] AC 356, Lord Hodson stated that:

> The nature of a plaintiffs remedy is a matter of procedure to be determined by *lex fori*. This includes the quantification of damages, but the question arises whether or not the English remedy sought and obtained by the judgment here fits in with the right as fixed by the foreign, that is the Maltese, law. It is argued that to award damages on the English principle is to make the right sought to be enforced a different right from that given by the *lex loci delicti* and that questions such as whether loss of earning capacity or pain and suffering are admissible heads of damages are questions of substantive law distinct from mere quantification which is purely a procedural matter.
>
> The distinction between substance and procedure was clearly stated by Tindal CJ in *Huber v. Steiner* [1835] 2 Bing N.C. 202 and by Lord Brougham in *Don v. Lippmann* [1837] 5 CI. & Fin. 1, 13. The latter said:

> The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made.

[36] In *Chan Kwon Fong v. Chan Wah* [1977] 1 LNS 12; [1977] 1 MLJ 232, Raja Azlan Shah FCJ (as His Highness then was) held that:

> Once the cause of action is established, then it is a matter of determining the nature of the plaintiff's remedy which is partly procedural and partly substantive – the actual Quantification of damages under the relevant heads being procedural: questions whether loss of earning capacity or pain and suffering are admissible heads of damage being questions of substantive law. I may as well add that the nature of the plaintiff's remedy is to be determined by *lex fori.*

[37] The basic general principle that can be gleaned from the above authorities is that in accordance with the principles of conflicts of laws, in an action for damages for breach of contract governed by foreign law, the measure of damages or quantification of damage, should be according to the *lex fori* ie, Malaysian law, even if the proper law of a contract is agreed to be foreign law. Applying this principle, in our judgment, determining that the plaintiff was entitled to general damages and not special damages would be considered to be questions of substance and hence governed by the *lex causae* ie, the English law being the law of the Contract. On the other hand, determining the actual "amount" of general damages is a matter of "quantification" or the "measure" of the general damages that the plaintiff is entitled to would be considered to be procedural matters governed by the *lex fori* ie, Malaysian law. In this regard, the Court of Appeal made an important observation, which we respectfully agree, and reproduced as follows:

> We agree with the learned counsel for the Defendant that the issue in this case is not one of "remoteness" but "the measure of damages". As stated earlier the Plaintiff had in their Amended Statement of Claim claimed specifically for the following:
>
> (i) General damages pursuant to paragraph 11 (alternatively paras 12 or 13) of the Amended Moment of Claim; or, in further alternative;
>
> (ii) Special damages pursuant to paragraph 14 of the Amended Statement of Claim.
>
> The learned Judicial Commissioner had, as earlier shown, at the end of the proceedings awarded general damages as prayed for in paragraph 11 of the Amended Statement of Claim i.e. the sum of USD25, 246,233.17.
>
> Therefore what is in issue before the court was one of quantum of damages or to be precise the quantum of general damages to be awarded and not whether the Plaintiff was entitled to claim general damages because they were too remote.

> As the issue before the court is one of quantification of the general damages, therefore relying on the authorities that have been submitted to use, we would agree with the learned counsel for the Defendant that in accordance with the principles of conflict of laws, the measure of damages or quantification should be in accordance with the *lex fori* ie, Malaysian law, even if the proper law of contract is agreed to be English law, as in the present case.
>
> Accordingly, we are of the view that the learned Judicial Commissioner erred in holding that English law applies in the present case.

[38] In our judgment, the Court of Appeal rightly took the approach that in accordance with the principles of conflict of laws, the measure of damages or quantification should be according to the *lex fori* ie, Malaysian law, even if the proper law of contract is agreed to be foreign law. In this respect, the learned JC erred in equating "remoteness" of damages with "measure'' of damages or "quantification" of damages. The learned JC erred when she concluded that the issue before the court was one of "remoteness" of damages and thus a matter of substantive right. The issue in this case was not one of "remoteness" but the "measure of damages". As observed by the Court of Appeal, the plaintiff had specifically elected to claim either general damages pursuant to para. 11 of the amended statement of claim; or, in the alternative, special damages pursuant to para. 14 of the amended statement of claim. The learned JC awarded general damages. It was not the defendant's contention that the plaintiff was not entitled to general damages because they were too remote. What was disputed was the quantum of the general damages that was awarded. General damages are given in respect of such damage as the law presumes to result from the infringement of a legal right and duty: damages must be proved but the claimant cannot quantify exactly any particular items in it (see *Chitty on Contracts, General Principles* (30th edn.) paras. 26-006). Having determined that the plaintiff was entitled to general damages, the learned JC should have applied Malaysian law in quantifying the measure of damages to be awarded. This was not a question of "remoteness" of damages. It was a determination of the amount of damages (quantum), thus the "measure of damages", to be awarded and not whether the plaintiff is entitled to damages (remoteness). Indeed, the proceeding before the learned JC was for the assessment of damages ie, the determination of the measure and quantum of damages that the plaintiff was entitled to. Therefore, in our judgment, the quantification of general damages ought to be according to Malaysian law, the *lex fori*.

[39] In consequence, our answers to Question 1 is as follows: The Court of Appeal did not reverse the conflict of laws principle enunciated in the cases referred to in the question.

[40] We now turn to consider Question 2.

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Question 2

[41] In essence, learned counsel for the plaintiff contended that irrespective of whether Malaysian law or English law was the law applicable to the assessment of recoverable damages, the end result would be the same. He submitted that it was plainly wrong for the Court of Appeal to find Malaysian law in this regard to be different from English law and to reduce the quantum of damages awarded by the High Court by 99.3%, from USD25,246,233.17 to USD177,410.90. The principal thrust of learned counsel's contention was that the proper damages recoverable under both systems of common law, where there was an available market for the goods, was the market differential in price as general damages, as correctly found by the High Court. He also put forward a submission that ss. 50 and 54 of the English Sale of Goods Act 1979, and ss. 56 and 61 of the Malaysian Sale of Goods Act 1957 and s. 74 of the Malaysian Contracts Act 1950, are statutory recitations of the common law rule established by the court in the well known case of *Hadley v. Baxendale* [1859] 9 Ex 341; where there is an available market, the loss directly and naturally resulting in the ordinary course of events is the market price differential under the first limb of *Hadley v. Baxendale (supra)*.

B C D

[42] In refuting the contention of the plaintiff, learned counsel for the defendant took the position that even if the law on assessment of damages for non-acceptance of goods pursuant to English law and Malaysian law may arrive at the same conclusion, the issue was whether the market price differential applied by the learned JC was applicable, or should be applied, in this case. Learned counsel submitted that the market price differential, which was merely a *prima facie* rule under s. 50(3) of the English Sale of Goods Act 1979, was not applicable in this case because it would result in a consequence contrary to principles of damages in contract law. In the result, he submitted that would put the plaintiff as assignee of the seller, Marinehub (assignor), in a position better than had the contract been performed without any breach – better by 14,230% more (or 142.3 times more) than what the assignor Marinehub would have made had the contract been performed without breach.

E F G

[43] The most important purpose of damages is to enable the innocent party to receive monetary compensation from the party at fault for the breach of contract. In this regard, as a starting point, we refer to the classic statement on this aspect of the law by Alderson B in *Hadley v. Baxendale (supra)* which has been well summarised in *Halsbury's Laws of Malaysia 2002* vol. 14 p. 20 as follows:

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> [240.015] the rule in *Hadley v. Baxendale*. Remoteness of damages is measured by reference to the following principles:
>
> 1. General damages. Damages recoverable as general damages cover the loss which is said to flow naturally from a breach of contract. This is commonly referred to as the first leg of *Hadley v. Baxendale*

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where the loss to be compensated should be such 'as may fairly and reasonably be considered as arising naturally' that is, according to the usual course of things, from such breach of contract itself.

2. Special damages. Special damages cover specially proved loss. They are also commonly referred to as the second leg of *Hadley v. Baxendale*, and allow recovery for such loss as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[44] Under English law, the assessment for a breach of contract for the sale of goods is governed by the Sale of Goods Act 1979. The English law applicable to assessment of damages where a buyer is in default starts with s. 50(1) the English Sale of Goods Act 1979 which confers the right on a seller to maintain an action for damages for non-acceptance of goods by the buyer. Section 50(2) provides the measure of damages for a claim under s. 50(1) and it provides that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. This is essentially a statutory enunciation of the first limb of the rule in *Hadley v. Baxendale (supra)*. Of greater relevance is s. 50(3), which provides the market price differential as follows:

Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.

[45] Section 50(3) of the 1979 Act sets out the applicable general rule under English law where there is an "available market for the goods in question". If there is an "available market" and a buyer wrongly fails to accept the goods the seller's damages are calculated by deducting the contract price from the market price at the time and place fixed by the contract for acceptance (see *Metelmann v. NBR* [1984] 1 Lloyd's Rep 614 and *Aercap Partners v. Avia Asset Management AB* [2010] EWHC 2431 and *Chitty on Contracts, Specific Contracts* (30th edn.), vol. 2, Chapter 43).

[46] It is pertinent to note that s. 50(1) the English Sale of Goods Act 1979 is identical to s. 56 of the Malaysian Sale of Goods Act 1957 which confers the right on a seller to sue a buyer for damages, where there is non-acceptance of the goods contracted for. However, the Malaysian Sale of Goods Act 1957 does not provide how damages thereunder are to be assessed or quantified as it does not provide the equivalent of sub-ss. 50(2) and (3) of the English Sale of Goods Act 1979. This is in its place provided by s. 74(1) of the Malaysian Contracts Act 1950 as follows:

74.(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby which

A naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

[47] The following illustrations to s. 74 indicate the application of market price differential to measure the recoverable damages:

B (c) A contracts to buy of B, at a stated price, 50 gantangs of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that C he will not accept it.

(d) A contracts to buy B's ship for RM60,000, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

D (o) A contracts to deliver 50 gantangs of saltpetre to B on 1 January, at a certain price. B afterwards, before 1 January, contracts to sell the saltpetre to C at a higher price than the market price of 1 January. A breaks his promise. In estimating the compensation payable by A to B, E the market price of 1 January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

[48] Under s. 74(1) of the Malaysian Contracts Act 1950, the party may recover any loss or damage which naturally arises in the usual course of things; or which the parties knew, when they made the contract, to be likely F to result from a breach of the contract. This provision is the statutory enunciation of the rule in *Hadley v. Baxendale* (see *Toeh Kee Keong v. Tambun Mining Co Ltd* [1967] 1 LNS 197; [1968] 1 MLJ 39, *Tan Chin Kim Sawmill and Factory Sdn Bhd & Anor v. Lindeteves-Jacoberg (M) Sdn Bhd* [1980] 1 LNS 73; [1980] 2 MLJ 204, and *Bank Bumiputra Malaysia Bhd Kuala Terengganu* G *v. Mae Perkayuan Sdn & Ors* [1993] 2 CLJ 495; [1993] 2 MLJ 76).

[49] Even though there is no corresponding sub-s. 3 of s. 50 of the English Sale of Goods Act 1979, our courts have applied the market price differential by way of s. 74(1) of the Malaysian Contracts Act 1950 to measure recoverable damages. This was shown in a number of cases.

H **[50]** First, the case of *Lee Heng & Co v. C Melchers & Co (supra)*, where in delivering the judgment of the Court of Appeal, Thomson CJ said:

> The measure of damages in such a case is normally the difference, if any, between the market value of the goods supplies and the market value of the goods ordered, both values being taken as at the date of delivery. This I is not because of anything contained in sub-section (3) of Section 53 of the Sale of Goods Act, 1893, for there is no corresponding sub-section in Section 59 of our Sale of Goods Ordinance. The law on the subject in this country is the general law relating to compensation for loss caused by breach of contract. That law is set out in Section 74 of the Contracts

(Malay States) Ordinance which is the same as Section 73 of the Indian Contract Act, which was held by the Privy Council in the case of *Jamal v. Dawood* 43 I.A 6 to be merely declaratory of the English common law relating to damages.

[51] Secondly, is the Supreme Court case of *Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd (supra)* where Mohamed Dzaiddin SCJ (as His Lordship then was) said:

... In considering the above question, it is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by Section 74(1) of the Contracts Act, 1950, which is the statutory enunciation of *Hadley v. Baxendale* [1854] 9 Ex 341 (*Tech Kee Keong v. Tambun Mining Co Ltd* [1968] 1 MLJ 39; *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd* [1993] 2 MLJ 76, SC. In essence, the section states that the party may recover any loss or damage for any breach which: (a) naturally arose in the usual course of things; or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it. For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v. Baxendale*, which is, the party may recover damages which may reasonably be supposed to have been in contemplation of both the parties, at the time they made the contract. See *Associated Metal Smelters Ltd v. Tham Cheow Toh* [1971] 1 MLJ 271. The English equivalent our Section 74(1) is section 50(2) of the Sale of Goods Act 1979, which was framed in terms of the first rule In *Hadley v. Baxendale* (*McGregor on Damages* (15th Ed) at para 835). Thus, section 50(2) states that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. If there is clearly no available market, then, consequential loss apart, the damages will be assessed at the contract price less the value of the goods to the Plaintiff at the time of the breach, which value is likely to be based upon the price at which the goods are eventually sold (*Ibid*, at para 836). Any relevant evidence may be admissible to prove this value (*Benjamin's Sale of Goods* (4th Ed) at para 16-068).

[52] And thirdly, we would draw attention to the Supreme Court case of *Eikobina (M) Sdn Bhd v. Mensa Mercantile (Far East) Re Ltd* [1994] 2 CLJ 6; [1994] 1 MLJ 553, where Peh Swee Chin SCJ said:

In this case there was an available market for the goods similar to the goods in question, a loss of profit as claimed is not a loss resulting from the first rule in *Hadley v. Baxendale*, ie, a loss that follows in the usual course of things, a proposition that is supported by a very strong and discernible trend in the cases as to beyond argument for us …

In *Kwei Teck Chao v. British Traders*, the ratio was stressed again that resale profits are not recoverable when there is a market, since normally what is contemplated in the usual course of things on non-delivery is at a plaintiff/buyer will go into the market and buy similar goods to honour his resale contracts when there is an available market.

A If the first rule of *Hadley v. Baxendale* does not apply we now examine the circumstances they could qualify for the second rule; the actual knowledge of special circumstances, *viz* whether details of such potential loss were made known to the contract breaker before or at the time of contract.

[53] The position under Malaysian law that the market price differential B applies to measure the recoverable damages where there is an available market for breach of a contract for the sale of goods is well summarised in *Halsbury's Laws of Malaysia 2004,* vol. 24, p. 414 as follows:

[410.254] Measure of damages – The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of C events, from the buyer's breach of contract. This is the ordinary rule of the ascertainment of damages for breach of contract, but it can be displaced by the express terms of the contract itself, as where damages for breach are fixed by the contract, but they must be such as plainly to show that it is intended to displace the rule.

D … There is no specific provision in the Sale of Goods Act 1957 (Act 382) on the measure of damages, however, the courts refer to the Contracts Act (Act 136) 1950 Section 74 which embodies the common law principles derived from *Hadley v. Baxendale* …

[410.255] Market-price rule for ascertaining measure of damages – Where there is an available market for the goods in question, the measure of E damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, at the time of the refusal to accept.

F This rule is founded on the general duty of the seller to mitigate his damage by taking all reasonable steps to minimize his loss, and, where in breach of contract for the sale of goods a buyer refuses to accept or pay for them, the reasonable step for the seller to take in normal circumstances is to sell the goods for the best price that he can. The difference between the market or current price at which he sells them and the contract price which he would have obtained for them is the true measure of the G damages consequent on the buyer's breach of contract.

[54] We adopt the principles as enunciated by the above mentioned cases that where there is an available market on the goods, general damages in the form of market price differential is recoverable by an innocent seller upon breach of contract on sale of goods by the buyer. Accordingly, on authority H as well as on principle, there is no difference between English law and Malaysian law on the assessment of recoverable damages. When there is an available market, pursuant to s. 74(1) of the Contracts Act 1950, the loss directly and naturally resulting in the ordinary course of events is the market price differential. Thus, the defendant's liability was for the difference I between the contract price and the market price at the time and place fixed by the contract for acceptance of the MFO. The Court of Appeal in this regard was therefore plainly wrong in failing to recognise that in a case where there was an available market for the goods, the law on the assessment of

damages for non-acceptance of goods pursuant to s. 56 of the Malaysian Sale of Goods Act 1957 and s. 74 of the Malaysian Contracts Act 1950 was the same or arrived at the same conclusion, as the corresponding provisions under s. 50 of the English Sale of Goods Act 1979.

[55] The Court of Appeal, without reference to any of the aforesaid case law on market price differential, reversed the High Court's judgment, and found loss of profits, computed against a third party contract. This was plainly wrong. With all due respect, the Court of Appeal failed to appreciate that loss of profit was special damages, not general damages.

[56] On the specific point raised by learned counsel for the defendant to the effect that the market price differential would put the plaintiff as assignee in a position better than what the assignor Marinehub would have made had the contract been performed without breach, it is important to appreciate the complexity and magnitude of international bunker trading. Bernard Khoo Kah Choon ("PW3") has been working in the international bunker industry for almost twenty-five years. He explained the workings of international bunker trading as follows. Bunker trading and supplying can involve as few as two parties, ie, supplier and owner of the vessel which requires bunkers, to several parties being involved in a string of contracts, especially if the ultimate buyer is a foreign party. The source bunker trading company will contract with a locally established bunker trader or supplier because it has done due diligence on that company and has permitted a credit-line for it. The trader/supplier in turn might source potential customers through his foreign office or through others such as a broker. The terms of each of the contracts as to the quantity and quality of the bunker sold and purchased are often identical, though the price and payment terms may vary. As a result of a breach by the end party to take delivery of the bunker, all intermediary parties will decline to take delivery of the bunker. This sets in motion a chain reaction, creating a domino effect on the parties down the string of contracts. The party who has ownership of the bunker is often left with the task of having to dispose of the bunker in the market, and claiming the loss from its immediate buyer. There will then be a series of claims that would work itself up the chain to the end purchaser, who wrongfully refused to accept delivery of the bunker.

[57] It was against the above backdrop that the contract provided for a total of 102.600mt +/- 5% of MFO to be delivered to the defendant in instalments of 34,200mt in October, November and December 2008. There were no fixed delivery dates within those months. Instead, consistent with the nature of the goods and their intended use as MFO for the defendant's ships, the contract envisaged that a number of separate relatively small deliveries would be made to ships throughout the course of each month. In order to supply the defendant under the contract, Marinehub had a contract to buy the MFO from the plaintiff. Marinehub therefore sought to obtain MFO to

be delivered pursuant to the contract from the plaintiff on a back-to-back basis. The plaintiff was thus the supplier of MFO to Marinehub for Marinehub to onward supply the defendant under the contract.

[58] In this regard, the managing director of Marinehub, Dr Hj Zainal Abdul Wahab ("PW1") testified that the defendant was well aware of the plaintiff's involvement in the supply and delivery of the MFO under the contract and that the plaintiff in turn had an arrangement for the physical delivery of MFO with Northwest, to the knowledge of Marinehub and the defendant. According to PW1, the defendant knew of these arrangements from previous transactions with Marinehub where the plaintiff was the principal and Northwest was the physical supplier. In his testimony, PW1 explained the consequence of the failure on the part of the defendant to take delivery the MFO in question:

> When MISC refused to take delivery of the remaining October quantities and terminated the FPC, Marinehub could not take corresponding delivery of MFO from SBS. We had no vessel to load it onto, since MISC refused to nominate its vessels to take delivery.
>
> We could not fulfil the SBS FPC because MISC breached the PC with us. Both the FPC and the SBS FPC were back to back, and dependant on the other to be fulfilled. The SBS FPC related the precise MFO to be delivered to MISC. Marinehub required MISC to honour the FPC and pay for the MFO. In order to fulfil he SBS FPC and pay SBS for the MFO. SBS demanded damages from Marinehub for breach of the SBS FPC.
>
> We acknowledge that Marinehub failed to perform the SBS FPC, forcing SBS to sell the MFO that was to be delivered to MISC in a falling market, at a loss. This was caused solely by MISC's breach of the FPC.
>
> Marinehub has lost the profit between the FPC and the SBS FPC in the sum of USD189, 209.90 and are liable to SBS for their loss resale of the MFO unlifted by MISC in the sum of USD26,466,497.22.
>
> Marinehub always acts on a back-to-back basis for the contract of sale and purchase of MFO. We have no capacity to take delivery of the MFO or to resell it. MISC knows we have no capacity to do this. So we left it to SBS to resell the uplifted MFO, but we are responsible for SBS's market loss. We have equally suffered market loss by MISC's breach of the FPC.

[59] It is not disputed that there was an available market to dispose of the MFO in October, November and December 2008. In this regard, the learned JC noted that the court needed to consider the appropriate time at which the market for 77,135.174mt of MFO was established as being available, to ascertain the proper price to be accepted as the market price in this instance, in computing the sum of money payable in damages. The learned JC made a finding that the evidence of PW3 was clear that in a declining market such as that in November and December 2008, 77,135.174mt of MFO could not be disposed of in one lot and that buyers and traders were cautious to see if

the price would decline further. The learned JC accepted that it would have taken a period of time to dispose of the 77,135.174mt of unlifted MFO by the defendant in the Singapore market, ie, one week for the October quantities, and two to three weeks each for the November and December quantities. The corresponding period established the available market. Furthermore, of the two published market rates, the learned JC found that the Platts Bunkenwire Index was the more appropriate index to use to ascertain the market price of the MFO for the relevant period. The learned JC then found that the differential in the market price published by Platts Bunkerwire and the contract price for the unlifted quantities (less -5%) gave rise to a recoverable loss of USD25,246,233.17. This was the plaintiff's loss as Marinehub's assignee.

[60] It is relevant to note that the defendant admitted through DW1, that it made a saving in excess of USD20 million by its breach of the contract, in the falling MFO market in November and December 2008. This USD20 million savings by the defendant corresponded to the market loss sustained by the plaintiff/Marinehub as the innocent sellers.

[61] In *Westbrook Resources Ltd v. Gobe Metallurgical Inc* [2007] EWHC 2353 (Comm), the English Commercial Court held:

> In carrying out this exercise one is not concerned with the acquisition costs of the goods sold. The seller may have acquired the goods at a price greater or less than either the contract price or the market price at the time of termination.
>
> The court is not concerned with the question whether either the breached contract or the substitute contract looked at in isolation returns or would have returned a positive revenue or income to the seller – the court is concerned with compensating the seller for the loss of the contract which loss can be measured by the difference between the contract price and the price obtainable in the market at the date of the breach.
>
> The assumption underlying this exercise is that with this additional amount of money the seller could, by selling in the market at the current price, put himself into the financial position he would have been in had the contract been performed according to its terms.
>
> The purpose of the exercise is simply to ensure that the seller is put into the same financial position as if the contract had been performed.
>
> Thus if the seller would in fact have had to go into the market to acquire goods in order to fulfil his contract of sale, that costs is disregarded. If it were taken into account it would have the effect of either increasing or diminishing the buyer's liability in a wholly arbitrary manner which had nothing to do with the contract which he had broken.

[62] As stated earlier, as assignee of the contract, the plaintiff's damages against the defendant for non-acceptance of the MFO was general damages, namely the difference between the contract price and the market price over

the period it would take any reasonable supplier to dispose of the unlifted quantities of MFO. This measure of damages, in our judgment, was the loss directly and naturally resulting, in the ordinary course of events, from the defendant's non-acceptance of the delivery of the MFO and for wrongful termination of the contract. In this case, the defendant had full knowledge from the very beginning that Marinehub had entered into a back-to-back SBS FPC with the plaintiff to ensure the supply of MFO to the defendant's ships under the contract. This point has already been made earlier on but deserved to be reiterated. Once the defendant breached the contract, which sets into motion chain reaction. In the context of the present case, it did not matter that Marinehub did not purchase the MFO from the plaintiff, nor that it did not in fact sell the MFO to alternative buyers after the contract was broken. The law assesses Marinehub's damages as if it had gone into the market and re-sold the goods. Damages are calculated on the assumption that Marinehub acted reasonably to mitigate its loss by going into the market to re-sell the MFO. This is to restrict the losses of an innocent seller, such as Marinehub.

[63] In our judgment, there was no error in the judgment of the learned JC. The learned JC had thoroughly analysed the relevant leading cases on each issue, considered the evidence tendered in detail, and applied correctly the relevant law to the facts of this case.

[64] In consequence, our answer to Question 2 is in the affirmative and that the Court of Appeal was not entitled to reverse the settled principle that general damages in the form of market price differential is recoverable by an innocent seller upon breach of contract by the buyer.

Conclusion

[65] In light of our findings and in the circumstances of this case, it is unnecessary for us to answer Questions 3 and 4.

[66] Despite the error by the learned JC in holding that the English law applied in considering the remedy (the general damages) available to the plaintiff in view of the governing law of the contract, the final sum of general damages payable as determined is correct. This is because, as we have stated earlier, the actual effect of the relevant provisions of the English Sale of Goods Act 1979 is the same upon the application of the relevant sections under the Malaysian Sale of Goods Act 1957 and the Malaysian Contracts Act 1950.

[67] We accordingly allow this appeal in part by setting aside the quantum of damages awarded by the Court of Appeal, and we hereby restore the quantum of damages awarded by the High Court in the total sum of USD25,246,233.17. We order the defendant to pay costs of this appeal to the plaintiff. We further order the deposit to be refunded to the plaintiff.